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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-78

MEL KAHN, etc.,

Appellants,

—v.—

ROBERT L. SHEVIN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR APPELLANTS

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I.

A dispensation setting women apart from similarly situated men does not assist in undoing inequalities in economic opportunity women encounter.

Appellees justify the gender line set by the widows tax exemption (Fla. Stat. §196.191(7)) as a reasonable means of serving state policy "to alleviate the hardship to women resulting from the inequality in economic opportunity."[1] The theme is familiar. Last term, this Court was asked to approve the gender differential challenged in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), because the statute dealt with "economic benefits" and reflected "the realities of

[1] Brief for Appellees at 4.

American life"—women's dependence on men.[2] Similarly, in *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973), the Court of Appeals was asked to approve exclusion of never married men from a tax benefit granted never married women because "employment opportunities and pay scales for women remain more restricted than for men."[3] The justification should fare no better here than it did in *Frontiero* and *Moritz*, for "benign dispensations" that set females apart from similarly situated males shore up the very attitudes and traditions that have so long served to keep women "in their place."[4]

It should be stressed that wide latitude of discretion in classifying *property* for tax purposes is not at issue in this case. What is in controversy is the breadth of discretion to classify *persons* solely on the basis of an immutable birth trait that bears no necessary relationship to need or abil-

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[2] Brief for Appellees, *Frontiero* v. *Richardson*, No. 71-1694, at 7, 10, 11-12.

[3] Brief for Appellee, 10th Cir. No. 71-1127, at 14; see also (Solicitor General's) Petition for a Writ of Certiorari, No. 72-1298, at 8-11.

Appellees' reading of the *Moritz* opinion (Brief for Appellees at 8 n. 4) is selective rather than "careful." Use of a gender classification in lieu of an income classification was the invidious means upon which the opinion focused. The further point made by the *Moritz* court concerning allowance of the deduction to widowers and divorcés but not to never married men, responded to a wholly distinct argument made by Moritz, i.e., that the statute differentiated irrationally between members of the same sex: "It merits emphasis that, in addition to its wholly irrational distinction between single sons and daughters, the statute capriciously prefers sons who are widowed or divorced to sons who are lifelong bachelors." Brief for Appellant, *Moritz* v. *Commissioner of Internal Revenue*, 10th Cir. No. 71-1127, at 24-25. Cf. text at notes 8-10 *infra*.

[4] See generally K. M. Davidson, R. B. Ginsburg & H. H. Kay, Text, Cases and Materials on Sex-Based Discrimination, Ch. 1 (Constitutional Aspects), especially at 8-10, and 53-57 (1974).

ity. Cf. *In re Estate of Legatos*, 1 Cal. App. 3d 657, 662, 81 Cal. Rptr. 910, 913 (1969) ("Both in their incidence and innate characteristics tax moneys are sexless and soulless.") If appellees' rationale is accepted, then Florida could, with at least equally "compelling" justification, dispense tax exemption solely on the basis of race or national origin.

Overlooked or misapprehended in appellees' presentation is the critical distinction between lump treatment of women as the inferior and therefore needier sex, and measures designed to undo the inequalities in economic opportunity women encounter. Continued exclusion of widowers from a tax exemption initiated in 1885 simply perpetuates the policy of a society in which women were separate and unequal.[5] The exemption surely does not address "the plight of women in the economic area" through means calculated to aid them "to sustain themselves in today's job market."[6] For such means address the problem at its source; principal examples are laws prohibiting gender discrimination in education, employment, financing, housing, and public accom-

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[5] "So great a favourite [was] the female sex of the laws of [Florida]" that women were accorded a widows exemption long before they achieved the franchise. Cf. I Blackstone, Commentaries 442-45 (1765). Similar solicitude was exhibited by this Court in *Quong Wing* v. *Kirkendall*, 223 U.S. 59 (1912) (upholding license fee exemption for women operators of hand laundries where no men were employed), and *Breedlove* v. *Suttles*, 302 U.S. 277 (1937) (upholding poll tax legislation more onerous for men than for women—women not required to pay for years in which they did not vote).

[6] Brief for Appellees at 24-25 (text at note 19). In this respect, Florida's exemption resembles the "favor" supplied by the differential in *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), discussed in Brief for Appellants at 23-24. More recently, legislatures and courts have become increasingly skeptical of such "favors." See, e.g., *Chastang* v. *Flynn and Emrich Co.*, 365 F.Supp. 957, 965-67 (D. Md. 1973).

modations.[7] Significantly, Florida's utilization of this means to undo inequalities has been minimal.[8]

Moreover, appellees' heartwarming statement of Florida's policy "to alleviate hardship to women" who must cope with the world without a male partner, and appellees' statistical references,[9] highlight a further irrationality in the statutory scheme. No gender-based exemption is accorded the female head of household who never married, or whose marriage was terminated by divorce. The unmarried or divorced woman has no greater economic opportunities than her widowed sister, indeed she may encounter sharper prejudice in the job market.[10] Further, she receives no statutory share in a man's estate, as does the widow,[11] to ease her plight.

Decades ago Burnita Shelton Matthews[12] commented: "It is of course disappointing to women that men of the legal

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[7] See, e.g., Griffiths, The Law Must Reflect the New Image of Women, 23 Hastings L.J. 1 (1971).

[8] While Florida prohibits sex discrimination in government employment, Fla. Stat. §§112.041, 112.042 (1967), 110.092 (1969), most of its anti-discrimination laws omit gender from the catalogue. See Fla. Stat. §§409.026 (1970) (prohibiting discrimination on the basis of race, color, or religion, but not sex, in the administration of social services), 509.092, 509.141 (1970) (discrimination in certain places of public accommodation—covers race, religion and national origin, but not sex).

[9] Brief for Appellees at 11.

[10] See, e.g., *Doe* v. *Osteopathic Hospital*, 333 F.Supp. 1357 (D. Kan. 1971) (termination of employment of unwed expectant mother); *Cirino* v. *Walsh*, 66 Misc. 2d 450, 321 N.Y.S. 2d 493 (Sup. Ct. 1971) (unwed mother who met all objective criteria for school crossing guard position found "not qualified" by police department because birth status of her children showed she lacked "good character").

[11] See *Simons* v. *Miami Beach First National Bank*, 381 U.S. 81 (1965).

[12] Then counsel to the National Women's Party, later United States District Judge for the District of Columbia.

profession are unable to see equality as equity when applied as between men and women." Women Should Have Equal Rights With Men, A Reply, 12 A.B.A.J. 117, 120 (1926). While benefits for widows, but not for widowers, originated in all-male chambers, the direction taken by women allowed to speak for themselves is clear: groups and legislators dedicated to the elimination of discrimination against women have emerged as principal proponents of protection on an equal basis to both men and women.[13]

Finally, appellees' analysis[14] of *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, Civil Action No. 268-73, D.N.J. December 11, 1973, 42 U.S. Law Week 2326, misses the essential point. Indeed, the claims of Stephen Wiesenfeld and Mel Kahn are barely distinguishable. In *Wiesenfeld*, 42 U.S.C. §402(g) was declared unconstitutional "insofar as it discriminates against widowers on the basis of their sex"; defendant was enjoined "from denying benefits . . . to widowers solely on the basis of sex." Had Paula Wiesenfeld died in Florida, no "benign dispensation" would have been accorded her surviving spouse under Fla. Stat. §196.191(7), despite the tragic impact of her death upon her family. Whether the female partner contributes to the economic welfare of her family through gainful employment

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[13] E.g., Griffiths, *supra* note 7, at 8-9. Prime sponsors of full extension of widows benefits to widowers under Social Security are Representatives Martha Griffiths and Bella Abzug. See, e.g., H.R. 9,715, 90th Cong., May 8, 1967; H.R. 841, 91st Cong., January 3, 1969; H.R. 3,289, 92d Cong., 1st Sess., February 2, 1971 (all introduced by Representative Griffiths); H.R. 15,528, 16,036, 16,101, 92d Cong., 2d Sess., June 15, 1972, July 26, 1972, and July 31, 1972 (introduced by Representative Abzug); H.R. 1570, 93d Cong., 1st Sess., January 9, 1973 (introduced by Representative Griffiths). The fact that the commission that wrote the 1968 Florida Constitution included only one woman among thirty-six members may well explain why the 1885 widows exemption emerged unchanged and was not converted to a widowed persons exemption. See 25A Fla. Stat. Ann. at ix.

[14] Brief for Appellees at 20-23, 25 and nn. 18, 19.

or homemaking services[15] or, as is increasingly the reality, through productive effort both on the job and at home, surely recognition of her worth would be enhanced by declaring Fla. Stat. §196.191(7) equally applicable to widows and widowers.

II.

The remedial choice on remand.

Based upon Alice-in-Wonderland reasoning, appellees would foreclose consideration of any remedial route other than elimination of the widows exemption.[16] Demolition of the exemption policy, "relief" surely not sought by appellant, is urged by appellees because: (1) the people of Florida ratified a revised Constitution in 1968; (2) that Constitution, among its many provisions, carried forward from the 1885 Constitution provision for a widows tax exemption; (3) curing the underinclusive classification by extending the exemption to widowers risks misreading the will of the people. Left out of this assessment is the larger risk of misreading that a demolition course entails. The exemption is currently available to approximately three-quarters of the widowed population.[17] Inclusion of the re-

[15] See Walker & Gauger, The Dollar Value of Household Work (College of Human Ecology, Cornell Univ. 1973).

[16] The Florida Supreme Court considered only the threshold question, whether the word "widow" could be defined to mean "widowed person." It ruled against such expansive definition. That court's further ruling that the gender line was constitutional left it without occasion to consider the remedial choice posed by an underinclusive classification. Nor is *Brinson* v. *State* (Fla. Sup. Ct., January 9, 1974, cited in Brief for Appellees at 27) relevant to a tax exemption constitutionally infirm for underinclusion. *Brinson* involved a criminal charge; judicial extension of a criminal statute, the Florida Supreme Court pointed out, is barred by the due process clause. No such impediment exists when the issue is extension of a benefit.

[17] See Brief for Appellant at 30 n. 26.

maining quarter is a small adjustment in comparison to the radical change effected by elimination of the exemption.

Moreover, the 1968 Constitution, including the widows tax exemption authorization, was presented to the people on a take-it-or-leave-it basis. The voters' acceptance of a three-quarter loaf, all that was offered them, surely does not indicate that they would have refused the whole, much less that they would have preferred abstinence to a full portion. On the contrary, the voters' approval of two new constitutional provisions suggests precisely the opposite. The 1968 Constitution substitutes for the former provision that "all men are equal before the law," the guarantee that "all natural persons are equal before the law," [18] and further stipulates that "there shall be no distinction between men and women in the holding, control, disposition, or encumbering of their property." [19] In short, a declared purpose of the exemption, to encourage the elderly "to continue to seek retirement homes in Florida," [20] signals the direction for a judiciary concerned with preservation rather than destruction of legislative policy and the will of the people.[21]

In any event, since widows were accorded the exemption during the period herein question, the denial of equal protection to appellants can be repaired only by according exemption to them for that period.

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[18] Art. 1, §2.

[19] Art. 10, §5.

[20] Brief for Appellees at 25.

[21] Cf. *Guinn* v. *United States*, 238 U.S. 347, 366-67 (1925); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942). On remand, at the very least, the Florida Supreme Court should have the opportunity to consider whether it wishes to adopt a remedial approach in harmony with this Court's precedent. See, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n. 25 (1973), where the annual cost factor

CONCLUSION

For the reasons presented by appellants, the decision of the Florida Supreme Court should be reversed, and Fla. Stat. §196.191(7) should be declared unconstitutional insofar as it differentiates between widowed persons solely on the basis of gender.

Respectfully submitted,

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for the benefit extended was an estimated $3.5 million in the Air Force and $1 million in the Navy. See Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Comm. on Armed Services, 92d Cong., 1st & 2d Sess. 12502-12503 (1972) (estimates for the other armed services not reported). Considerably higher costs were entailed in, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Graham* v. *Richardson*, 403 U.S. 365 (1971); and *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). See also *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (gender-based tax exemption judicially extended to cure underinclusion).

Attorneys for appellant gratefully acknowledge the assistance provided in the preparation of this brief by Mary R. Hardin, third year student, Columbia Law School.